BOARD OF COUNTY COMMISSIONERS
INTER-OFFICE MEMORANDUM

TO: Tony Park, Director
Public Works

FROM: Herbert W. A. Thiele, County Attorney
Daniel J. Rigo, Assistant County Attorney

DATE: June 30, 2005

SUBJECT: Private Paved Road Repair Program;
Use of Special Assessments and Various Other Legal Issues

This memorandum addresses the legal issues involved in the development of the new Private Paved Road Repair Program (the "Program") to be considered for adoption by the Board of County Commissioners (the "Board"). The validity of the new Program is primarily dependent on Board's consideration of two legal issues.

First, the Board must make a legislative finding that the purpose of advancing County funds to make the private road repairs is primarily or substantially a public purpose. Such a finding would make the benefit to the private individuals abutting the road only incidental to the paramount public purpose of the Program.

Second, the Board must determine how the reimbursement of the funds advancement will be paid to the County. The options include a special assessment levied on those specially benefited by the road repairs and collected as a non-ad valorem tax, or the imposition of a service charge collected by the Tax Collector but which is prohibited from being included on a bill for ad valorem taxes. These two issues are further addressed below.

Finding of Paramount Public Purpose

Our office has advised the Board in the past about the necessity of a public purpose in the expenditure of public funds. Most recently, we advised the Board on June 14, 2005 in an agenda item regarding proposed revisions to Policy No. 01-06, entitled "County Commission Projects Requiring Commitment of Staff Time.", as follows:

> County Commissioners are constitutional officers whose powers and duties are derived by the Constitution and are fixed by the legislature. Wright v. Cramdon, 156 So. 303 (Fla. 1934). Chapter 125, Florida Statutes, defines the County Commission as the governing body of a county, which has the power to carry on County government.

Section 125.01, Florida Statutes, sets forth numerous specific powers, including the power to perform any acts not inconsistent with general law, which are in the common interest of the people of the county, and the board may exercise all powers and privileges not specifically prohibited by law. The Florida courts have found that county commissioners have a wide discretion in exercising the authority conferred upon them by Florida Statutes; however, this discretionary authority is to serve the state and the public generally, rather than a particular individual. Owen v. Baggett, 81 So. 888 (Fla. 1919).

While carrying out the functions of county government, Section 125.01(7), Florida Statutes, requires that no county revenues be used to fund services or projects when no real or substantial benefit accrues to the residents of the county. Under Article VII, Section 10, Florida Constitution, public funds may be used only to accomplish a public purpose. For example, this constitutional provision prevents the County from lending or using its taxing power or credit to aid any private corporation, association, partnership, or person. The Florida Supreme Court has ruled that the purpose of this provision is to protect public funds and resources from assisting or promoting private ventures, when the public would be, at most, only incidentally benefited. Bannon v. Port of Palm Beach District, 246 So.2d 737, 741(Fla. 1971). Thus, the expenditure of County resources must serve a "paramount public purpose," rather than an incidental public purpose or a private purpose. Poe v. Hillsborough County, 695 So.2d 672 (Fla. 1997). Furthermore, the expenditure should accomplish a *county* purpose specifically. See, AGO 88-52, and AGO 95-66 (County funds to be used only for County purpose).

The determination of that which constitutes a valid public purpose for the expenditure of public funds is, at least initially, within the legislative judgment of the board of county commissioners. State v. Housing Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979). The governing body is required to take into consideration the purpose of the project and the benefits accruing to the county when determining whether to expend funds for a specific project. Further, the ethics provisions contained within Chapter 112, Florida Statutes, are another source for consideration by the Board when determining how to utilize County funds and resources. For example, Section 112.313(7), Florida Statutes, prohibits a public officer and employee from having a contractual relationship or employment with an agency or business entity that would create a continuing conflict of interest or impede the full and faithful discharge of public duties. This Statute is designed to be preventive in nature. It should be noted that this Statute defines the term "business entity" to include a non-profit organization, such as a 501(c) corporation.

Section 112.313(6), Florida Statutes, states that a public officer may not corruptly use or attempt to use his or her official position or any property or resource within his or her trust to secure a special privilege, benefit or exemption for themselves or another. "Corruptly" means done with wrongful intent or in a manner inconsistent with the proper performance of public duties. Blackburn v. State Commission on Ethics , 589 So.2d 431(Fla. 1st DCA 1991).

With regard to the use of public funds to repair or improve private roads, the Florida Attorney General (the 'AG") has consistently maintained that such use of funds would violate Article VII, Section 10, of the Florida Constitution because it would not accomplish a public purpose. Most recently, the AG was asked by the Palm Beach County Attorney, "[m]ay the county commission expend public funds to provide private communities with services such as the *repair and maintenance of privately-owned roads*, ..." (emphasis added). The AG responded in AGO 2002-48 by citing to Article VII, section 10, Florida Constitution, and concluding that it, "prohibits the state and its subdivisions from using their taxing power or pledging public credit to aid any private person or entity." The AG further concluded:

> The purpose of this constitutional provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefitted." However, if the expenditure primarily or substantially serves a public purpose, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10.
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> Thus, in order to satisfy Article VII, section 10, Florida Constitution, the expenditure of county funds must be for a public purpose. This office, in determining whether public funds may be expended for improvements to private property such as private roads, has considered whether the governmental entity has a property right or interest in such property or whether the public has an easement or right to use the property.
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> For example, in Attorney General Opinion 79-14, this office concluded that the expenditure of public funds by a municipality to repair or maintain private streets in which the municipality has no property rights or interest, and over which the public has no easement or right of use, would appear to contravene the public purpose requirements of Article VII, section 10, Florida Constitution.

The AG has maintained this opinion even when presented with the fact that certain public vehicles, such as school buses, were permitted to travel on the private road. In AGO 92-42, the AG concluded, "[Hamilton County] may not expend county funds to repair and maintain private roads, regardless of an agreement allowing school buses to travel upon the road to transport the children of the landowner/parent."

In his opinions, however, the AG defers to the Board of County Commissioners in the determination of the public purpose. In AGO 2002-48, he noted that, "the determination of whether the expenditure of county funds serves a county purpose is one that the board of county commissioners, as the legislative body for the county, must make." Thus, in order for the Board's new Program to proceed, the Board would first have to make the legislative determination that the Program serves a paramount public purpose. For the Board to do so, we advise that the Board adopt a Resolution similar to the attached draft prepared by our office. Although such a finding, contrary to the numerous AG opinions, would arguably be vulnerable to challenge, the courts have generally not second guessed a Board's legislative findings unless the challenger can prove that the finding was arbitrary.

If the Board determines that there is not a paramount public purpose in proceeding with the Program, an alternative is to utilize a method similar to that in the Board's Private Dirt Road Repair Program. The AG, in AGO 99-15, approved such a program because it provides for all costs incurred for the services to be borne by the property owners requesting such services. The Board's Private Dirt Road Repair Program requires the property owners to pay in advance for the cost of the services. With the higher costs involved in the proposed new Program, a requirement of advance payment by the property owners would likely not be feasible. Although the AG opinion does not address whether or not the provision for payment by the property owners could be a reimbursement of costs advanced by the County, at least one court has found that such a reimbursement of public funds is inappropriate. In *Brumby v. City of Clearwater*, 149 So. 203 (Fla. 1933) the Florida Supreme Court invalidated a contract involving the City's dredging of a channel and basin for the use of a private individual. The contract was found by the Court to be an attempt by the City to finance a private enterprise for the use and benefit of an individual because it included terms and conditions providing that, "the cost of such facilities should be reimbursed to the city by the individual for whose benefit the same was proposed to be furnished in monthly installments extending over a period of years." Based on the *Brumby* case, our office would advise that, absent the Board's adoption of a Resolution finding a paramount public purpose in the proposed new Program, any costs of the Program should be paid by the property owners in advance.

Reimbursement of Funds: Special Assessment or Service Charge?

Upon the adoption of a resolution similar to the attached draft, the Board would have two options for the reimbursement of the costs incurred for the road repair services. The Board could either levy special assessments on all property owners specially benefitted by the repairs and improvements, or it could impose service charges on only those property owners voluntarily participating in the Program. For the reasons set forth below, we advise that the imposition of service charges would be the more appropriate method of reimbursement.

Our office recently addressed the legal issues involved with the validity of special assessments in a February 1, 2005 memo to the OMB Director and Public Works Director, as follows:

> The County's 2/3 2/3 special assessment program derives its genesis from traditional home rule authority of counties and Florida case law. The greatest challenge in imposing a valid special assessment is to avoid the classification as a tax. Under the Florida Constitution, no tax other than ad valorem taxes may be levied without general law authorization. However, counties require no similar specific general law authorization for special assessments. *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992).
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> Special assessments and taxes are distinguishable because no requirement exists that taxes provide a special benefit to property; rather, taxes are levied for the general benefit of residents and property. As established by case law, two requirements exists for the imposition of a valid special assessment: (1) the property assessed must derive a special benefit from the improvement or service provided; and (2) the

assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. *City of Boca Raton v. State*, 595 So.2d at 29. If a special assessment ordinance withstands the special benefit and reasonable apportionment tests, the assessment is not a tax and the traditional focus is then on whether the methods prescribed by the home rule ordinance were substantially followed. *Madison County v. Foxx*, 636 So.2d 39 (Fla. DCA 1994).

Many assessed services and improvements have been upheld as providing the necessary in requisite special benefit. Such services and improvements include: garbage collection; sewer improvements; fire protection; street improvements; parking facilities; downtown development; storm water management services; and water and sewer line extensions.

Although the benefit derived need not be direct and immediate, the benefit must to special and peculiar to the property assessed and not a general benefit to the entire community. An improvement or service which specifically benefits the assessed properties must also be "fairly and reasonably apportioned among the benefited properties". *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992).

Traditionally, the courts have upheld legislative findings that the apportionment method was reasonable unless the challenger could prove that the finding was "palpably arbitrary or grossly unequal and confiscatory". *Sarasota County v. Sarasota Church of Christ*, 667 So.2d 184. The Supreme Court extended the same standard to legislative findings on the special benefit. The Court stated, the "legislative determination as to the existence of special benefits and as to apportionment of the costs of those benefits should be upheld unless the determination is arbitrary". *Sarasota County v. Sarasota Church of Christ*, 667 So.2d 184. If the assessment is not fairly and reasonably apportioned among the benefited properties, then it would be determined to be arbitrary and stricken. In which case, the assessment could not be enforced.

Importantly, in order to avoid a claim that an assessment is arbitrary and that it is not fairly and reasonably apportioned among the benefited properties, the government must uniformly impose, administer and collect special assessments or face an equal protection clause argument. In other words, special deference cannot be afforded to one group of recipients of a special assessment project without necessarily causing or creating all similar special assessments to be declared arbitrary and capricious, and in conclusion unenforceable. Claims for reimbursement of assessments previously paid would no doubt emanate as a result of any such conclusion.

The use of special assessments for repairs and improvements to private roads has been addressed by the AG. Although in AGO 85-90, the AG concluded that a county is not authorized to levy special assessments for improvements to private roads, his opinion was based on a lack of public purpose in making such repairs. Under the Board's proposed new Program, the adoption of a Resolution similar to the draft attached may overcome the AG's public purpose concerns. However, the Board's legislative finding of public purpose would be vulnerable to challenge in light of the AG's

opinions to the contrary, and gives our office a concern over the use of special assessments in the Program. In order for the Board's Program to validly use special assessments, it would be required to levy special assessments on every property owner specially benefitted by the repairs and improvements, regardless of whether they voluntarily participated in the Program. Given the vulnerability of the Board's public purpose finding, our office suggests that the Board avoid any use of involuntary special assessments. If the payment requirements are limited to only those voluntarily participating in the Program, the risk of a public purpose challenge will be much less likely.

Our office advises that the use of service charges for the reimbursement of costs in the Program would be the preferred method. Service charges differ from special assessments in that they are charges imposed only on those voluntarily using the services. The use of service charges is likely to result in a much lower risk of a challenge to the Board's finding of a public purpose for the Program because only those agreeing to the payment such charges would be required to pay.

Section 197.363(5), Florida Statutes, provides a method for the Board to collect service charges through the use of the Tax Collector as its agent, as follows:

> The tax collector of a county may act as agent for the county in collecting service charges if the board of county commissioners of the county and the tax collector establish by agreement a manner in which service charges may be collected. The board of county commissioners shall compensate the tax collector for the actual cost of collecting such service charges. However, tax certificates and tax deeds may not be issued for nonpayment of service charges, and such charges shall not be included on a bill for ad valorem taxes.

The other important difference between a special assessment and a service charge is that a service charge is collected separately from the ad valorem tax bill and, unlike a special assessment, the nonpayment of a service charge may not result in the issuance of a tax certificate or a tax deed.

In order for the Board to utilize the collection of service charges in the Program, it would have to enter into an agreement with the Tax Collector pursuant to the terms of Section 197.363(5).

DJR/jm

Attachment

cc: Parwez Alam, County Administrator
Alan Rosenzweig, Director of Office of Management & Budget

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RESOLUTION: 05-_____

PROVISION OF COUNTY SERVICES TO ASSIST IN REPAIR OF PRIVATELY-OWNED PAVED STREETS, ROADWAYS, AND OTHER RIGHTS-OF-WAY FUNDED THROUGH THE IMPOSITION OF SERVICE CHARGES ON THE OWNERS APPLYING FOR SUCH SERVICES

WHEREAS, there exists in the unincorporated areas of Leon County, Florida (the "County") a substantial number of privately-owned paved streets, roadways, and other such rights-of-way which are not dedicated to the public nor which otherwise have any ownership interest held by the County (the "Private Paved Roads"); and

WHEREAS, in many instances, the Private Paved Roads have fallen into varying degrees of disrepair, thereby resulting in significant problems with the ingress and egress of private and public vehicles to and from the residences on such Private Paved Roads; and

WHEREAS, such ingress/egress problems will continue to have significant effects on the emergency response time of the County's emergency medical vehicles, the Sheriff's vehicles, and fire protection vehicles, and on the level of service provided by other public vehicles such as utility services vehicles, school buses, and mail delivery vehicles; and

WHEREAS, in order to have repairs and improvements made to their Private Paved Roads and eliminate the ingress/egress problems, property owners have historically utilized the County's special assessment improvement program provided in Article II of Chapter 16 of the Code of Laws of Leon County (the 2/3 2/3 Program), which provides for the County to acquire the appropriate property interests in the rights-of-way determined to be necessary for the County to reconstruct the Private Paved Roads in a manner which brings the roads into compliance with County standards, after which the roads become County roads owned and maintained by the County; and

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WHEREAS, with the significant increase in the costs of road construction and right-of-way acquisition, the 2/3 2/3 Program has become cost-prohibitive for many of the participants due to the unmanageable amount of the special assessment resulting from the increased costs of the road improvement project.; and

WHEREAS, the Board of County Commissioners (the "Board") has received suggestions from owners of Private Paved Roads expressing an interest in participating in the cost of a County road improvement program if the Board would adopt an lower-cost alternative to the 2/3 2/3 Program; and

WHEREAS, pursuant to the Board's request, County staff has proposed an alternative road improvement program, with costs significantly lower than the 2/3 2/3 Program, whereby the County would provide road repair services, through either its staff or its contractors, to willing participants owning ingress/egress easements on and over existing Private Paved Roads, with the total cost of such services being borne by the participants through the collection of service charges imposed on the participants in equal shares (the "Private Paved Road Repair Services Program"); and

WHEREAS, County staff has advised the Board that the provision such road repair services will alleviate the ingress/egress problems currently existing on many Private Paved Roads.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Leon County, Florida, that:

1. The ingress/egress problems resulting from the existing condition of many Private Paved Roads in the unincorporated areas of the County has significant adverse impacts on the emergency response times of the County's emergency medical vehicles, the Sheriff's vehicles,

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and fire protection vehicles, and on the level of service provided by other public vehicles such as utility services vehicles, school buses, and mail delivery vehicles.

2. In order to protect the health, safety, and welfare of the County's citizens, the ingress/egress problems existing on Private paved Roads must be alleviated by any means legally and fiscally possible, even if it results in the provision of road repair services by the County in advance of the collection of service charges for the cost of such road repairs.

3. Based on the information presented to the Board regarding the existing ingress/egress problems on Private Paved Roads and the alternatives to alleviate such problems, the Board hereby finds that the Private Paved Road Repair Services Program, the concept of which was presented to the Board at its regular meeting on July 12, 2005, represents a paramount public purpose in alleviating the ingress and egress problems of the County's emergency medical vehicles, the Sheriff's vehicles, and fire protection vehicles, and improving the level of service provided by other public vehicles such as utility services vehicles, school buses, and mail delivery vehicles.

DONE AND ADOPTED by the Board of County Commissioners of Leon County, Florida, on this the 12th day of July, 2005.

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LEON COUNTY, FLORIDA

BY: _____
Cliff Thaell, Chairman
BOARD OF COUNTY COMMISSIONERS

ATTEST:

BOB INZER, CLERK OF THE CIRCUIT COURT
LEON COUNTY, FLORIDA

BY: _____

APPROVED AS TO FORM:

OFFICE OF THE COUNTY ATTORNEY
LEON COUNTY, FLORIDA

BY: _____
Herbert W.A. Thiele, County Attorney